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MICHAEL RODAK, JR., CLERK

No. 75-6202

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

LANIS BURST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.

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OPINIONS BELOW

Neither the order of the court of appeals (Pet. App. 8-9)  
nor the opinion of the district court (Pet. App. 2-7) is reported.

JURISDICTION

The judgment of the court of appeals was entered on  
January 9, 1976. The petition for a writ of certiorari was  
filed on February 13, 1976. The jurisdiction of this Court is  
invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether appointed counsel's failure to raise any issue  
on petitioner's behalf on direct appeal of his conviction  
denied petitioner the right to counsel.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and co-defendant Thomas Sims were convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) and 18 U.S.C. 2(a). Petitioner was sentenced to twenty years' imprisonment. Both defendants were represented by one attorney, who was not the same attorney who was assigned to their appeal.

On direct appeal of their convictions,<sup>1/</sup> the court of appeals appointed one attorney to represent both petitioner and Sims. Although the brief filed by counsel in the court of appeals referred to petitioner in the caption, he was not mentioned in the text. The brief presented no issue on petitioner's behalf, nor would the arguments raised on behalf of his co-defendant have entitled petitioner to a new trial even had they been accepted by the court of appeals.<sup>2/</sup> After that

1/ Following their conviction, petitioner and Sims initially filed a motion to vacate their sentences under 28 U.S.C. 2255, on the ground that the trial court had improperly considered their attempted escape and an assault on a turnkey in assessing their sentences. The district court denied that motion, the court of appeals affirmed, and this Court denied certiorari (419 U.S. 1123).

Petitioner and Sims meanwhile had filed a second Section 2255 motion requesting that they be resentenced, because their trial counsel inadvertently had permitted the appeal period to lapse. The district court granted that motion, vacated their original sentences, and resentenced them to the same terms. The direct appeal of their convictions followed.

2/ Those issues involved the destruction of an F.B.I. agent's notes of an interview with Sims, in which he admitted his involvement in the bank robbery, and a claim of prejudicial introduction of evidence of other crimes committed by Sims because the F.B.I. agent stated that this interview occurred in a jail.



on direct appeal, the district court denied petitioner's motion (*ibid.*). Petitioner, still acting pro se, appealed. The court of appeals affirmed for the reasons stated by the district court (Pet. App. 9).

#### ARGUMENT

If petitioner had meritorious arguments to present on appeal, counsel's failure to mention him in the brief would appear to constitute ineffective assistance. But if petitioner had no such argument, counsel's responsibilities were governed by the standards of Ellis v. United States, 356 U.S. 674, and Anders v. California, 386 U.S. 738. The likely explanation of appellate counsel's failure to mention petitioner is that he implicitly concluded that petitioner had no arguable issue to present to the Sixth Circuit.

In Ellis the court of appeals denied petitioner leave to proceed in forma pauperis after counsel, appointed by the court of appeals, informed that court that petitioner had no meritorious issues to present on appeal. The Solicitor General confessed error, and the Court reversed. It wrote (356 U.S. at 675):

In this case, it appears that the two attorneys appointed by the court of appeals, performed essentially the role of amicus curiae. But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.

unpublished opinion in *Ellis* did not follow the procedure established by *Ellis*.

*Anders* held that, when an attorney for an indigent defendant concludes that his client's case is frivolous, counsel may request the appellate court's permission to withdraw from the case, but he must accompany his request with a brief referring to anything in the record that might support the appeal. 386 U.S. at 744-745. The indigent must be furnished with a copy of that brief and afforded an opportunity to raise any points that he considers significant. With the guidance furnished by the advocate's prior review of the record, the appellate court then must fully examine the proceedings below to determine if the appeal is wholly lacking in merit (*ibid.*). If it finds the case to be lacking in substance that an appeal in a paid case would have been dismissed (*see Ellis, supra*, 355 U.S. at 675), the appellate court then may grant counsel's request to withdraw and may dismiss the appeal. But if it determines that any of the legal issues presented are arguable on their merits, it must afford the indigent assistance of counsel who will pursue the appeal as an advocate rather than as an *amicus*. See *Douglas v. California*, 372 U.S. 738; *Coppedge v. United States*, 369 U.S. 675.

Here, it appears that petitioner was not afforded even the degree of assistance provided by the "no-merit" letter held constitutionally inadequate in *Anders*. Although appellate counsel failed to advance any argument on petitioner's behalf,

he did not seek to withdraw his representation; thus, he preserved the appearance that he was actively representing petitioner's interest. The record leads us to conclude that petitioner was in effect abandoned by his attorney on direct appeal and that he has never received legal assistance in presenting any arguments he may have to overturn his conviction. Although petitioner's motion for the dismissal of counsel may have alerted the court of appeals to the necessity of considering his position with care, the circumstances forced it to review the trial transcript without the perspective and guidance provided by an advocate's participation. <sup>5/</sup> Anders and Ellis held that even if counsel ultimately determines that the direct appeal should not be pursued, the criminal defendant is entitled to an adversarial presentation of all arguable issues on his behalf so that the reviewing court can fully satisfy itself that the questions presented are indeed frivolous. <sup>6/</sup> Petitioner was afforded no such protection in this case.

Even though we would argue in the appropriate forum that the issues raised by petitioner in his Section 2255 motion do not entitle him to a new trial and would not have

<sup>5/</sup> The court of appeals' opinion on direct appeal does not advert to any of the issues raised by petitioner in his motion for dismissal of counsel.

<sup>6/</sup> That the court of appeals denied petitioner's motion for dismissal of counsel without prejudice to his right to file a brief on his own behalf is not dispositive. Anders established that if counsel suggests to the court that there is no proper basis for an appeal, the defendant must be provided an opportunity to respond to the brief accompanying counsel's motion to withdraw, so that he may raise any issues that he believes the court must consider. id. at 744.

required a reversal of the conviction on direct appeal, we do not believe that those contentions can be dismissed as not arguable on their merits. The district court's considered opinion on these claims (Pet. App. 2-7) supports this assessment. Therefore, we submit that petitioner must be afforded the assistance of counsel to present any non-frivolous arguments against his conviction to the court of appeals. The proceeding should be treated as if it were the direct appeal from his conviction.

#### CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the court of appeals with directions that counsel be appointed to represent petitioner in that court in order to proceed as if on direct appeal from the judgment of conviction.

Respectfully submitted,

ROBERT H. BORK,  
Solicitor General.

MAY 1976.